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APPENDIX A

Supreme Court of Florida

No. SC06-769

STATE OF FLORIDA,

Appellant,

vs.

MARK K. SACHS,

Appellee.

[January 18, 2007]

PER CURIAM.

We have for review *State v. Sachs, 926 So. 2d 440 (Fla. 3d DCA 2006)*, in which the Third District Court of Appeal affirmed the trial court's ruling based upon the parties' stipulation at the trial level as to the controlling effect of *State v. Harden, 873 So. 2d 352 (Fla. 3d DCA 2004)*, aff'd, *938 So. 2d 480 (Fla. 2006)*. At the time the Third District Court issued its decision in Sachs, Harden was pending review in this Court. We have jurisdiction. See *art. V, § 3(b)(1), (3), Fla. Const.*; *Jollie v. State, 405 So. 2d 418 (Fla. 1981)*.

We recently affirmed the Third District Court's decision in Harden. See *State v. Harden, 938 So. 2d 480 (Fla. 2006)*. As a result, we issued an order on September 20, 2006, directing the appellant to show cause why this Court should not summarily affirm Sachs in light of our decision in Harden. Appellant agreed

that "Harden is controlling in the instant case, and summary affirmance is appropriate." Therefore, based upon our decision in *Harden* and the appellant's response to the order to show cause, we summarily affirm the decision of the Third District Court in Sachs.

It is so ordered.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity

Third District - Case No. 3D04-1244 (Dade County).

Bill McCollum, Attorney General, Tallahassee, Florida, and Jennifer Falcone Moore, Assistant Attorney General, Miami, Florida,

for Appellant.

Milton Hirsch of Milton Hirsch, PLLC, Miami, Florida,

for Appellee.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

STATE OF FLORIDA,

Appellant,

v.

MARK K. SACHS,

Appellee.

CASE NO. 3D04-1244

LOWER TRIBUNAL NO. 02-32726.

Opinion Filed April 12, 2006.

DECISION WITHOUT PUBLISHED OPINION

An Appeal from the Circuit Court for Miami-Dade County, Mary Barzee, Judge.

Charles J. Crist, Jr., Attorney General, and Jennifer Falcone Moore, Assistant Attorney General, for appellant.

Roberto D. Stanziale, for appellee.

Before GERSTEN, RAMIREZ, and SHEPHERD, JJ.

PER CURIAM.

Based on the parties' stipulation at the trial level as to the controlling effect of *State v. Harden, 873 So. 2d 352 (Fla. 3d DCA 2004)* (finding *section 409.920(2)(e), Florida Statutes*, unconstitutional), appeal pending, No. SC04-613, we hereby affirm.

APPENDIX C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR

MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. F02-32726

MARK KENNETH SACHS,

Defendant.

ORDER OF DISMISSAL

THIS CAUSE having come before this Court upon Defendant's Motion to Dismiss; and the Court having heard argument and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED that Defendant's Motion to Dismiss is GRANTED and the within cause is dismissed with prejudice, for the following reasons:

1. The State and Defense have stipulated that the decision in *State v. Harden* is controlling.

2. Based solely upon the holding in *State v. Harden*, finding Florida Statute 409.920(2)(e) unconstitutional, this case is hereby dismissed with prejudice.

DONE AND ORDERED in Miami-Dade County, Florida, on this 6th day of May, 2004.

_____

THE HON. MARY BARZEE

Copies furnished to:

Milton Hirsch

Teresa Williams

APPENDIX D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MARK KENNETH SACHS, (A)

Defendant.

_____/

CASE NO. F02-32726

OSWP CASE NO.: 2002-0291-SFB

INFORMATION FOR:

COUNT 1:

Racketeering

F.S. 895.03 (F1)

COUNT 2:

Conspiracy to Commit Racketeering

F.S. 895.03(4) (F1)

COUNT 3:

Medicaid Provider Fraud

F.S. 409.920(2)(e) (F3)

IN THE NAME AND BY THE AUTHORITY OF THE

STATE OF FLORIDA

COUNT 1:

Racketeering

MELANIE ANNE HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that beginning on or about May 1, 1997 and continuing through and including on or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as part of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including the Second and Eleventh Judicial Circuits, the defendant **MARK KENNETH SACHS**, and others known and unknown to the prosecution were employed by and did associate with an enterprise as defined by Section 895.02(3), Florida Statutes, to-wit: IV Solutions, Inc. and a group of individuals associated in fact, though not a legal entity, to wit: Mark Kenneth Sachs, Elizabeth Pascual and Isabel Calderon. The object of the enterprise was to engage in racketeering activity within the meaning of Section 895.02(1), Florida Statutes, by committing crimes chargeable by indictment or information under Chapter 490, Florida Statutes, relating to Medicaid Provider Fraud. The aforementioned defendant and others known and unknown to the prosecution did unlawfully, willfully and knowingly conduct or participate, directly or indirectly, in such enterprise, through a pattern of racketeering activity as defined by Sections 895.02(1)(a)4, Florida Statutes, by engaging in at least two incidents of racketeering activity which had similar intents, results, accomplices, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics and were not isolated incidents in violation of Section 895.03, Florida Statutes, including, but not limited to the following:

PREDICATE A: MEDICAID PROVIDER FRAUD

On or about May 1, 1997, and continuing through and including May 31, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) in U.S. Currency for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE B: MEDICAID PROVIDER FRAUD

On or about May 1, 1997, and continuing through and including September 3, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal

conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1117, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE C: MEDICAID PROVIDER FRAUD

On or about June 3, 1997, and continuing through and including September 8, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback,

bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1232, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE D: MEDICAID PROVIDER FRAUD

On or about August 25, 1997, and continuing through and including October 2, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing,

leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1334, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE E: MEDICAID PROVIDER FRAUD

On or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of ten thousand dollars ($10,000.00) via check number 1440, Capital Bank account number 10501008421, for

prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

COUNT 2:

Conspiracy to Commit Racketeering

MELANIE ANN HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about the May 1, 1997, and continuing through and including on or about the November 6, 1997, as apart of a related transaction occurring in two or more judicial circuits or in connection with an organized criminal conspiracy affecting two or more judicial circuits, including the Second and Eleventh Judicial Circuits of Florida, to-wit: Leon and Miami-Dade Counties, Florida, the defendant, **MARK KENNETH SACHS**, did unlawfully and knowingly combine, conspire, confederate and agree, each with the other and together with others, to wit: Elizabeth Pascual and Isabel Calderon, to violate the laws of the State of Florida, to-wit: the laws which prohibit any persons employed by or associated with any enterprise as defined in Florida Statute 895.02(3), and the defendant, **MARK KENNETH SACHS**, was employed by or associated with an enterprise, from conducting or participating, either directly or indirectly, in the affairs of said enterprise through a continuous pattern of racketeering activity, in violation of Florida Statute 895.03(3), and through said enterprise did either engage in at least two incidents of racketeering activity or otherwise participated in the affairs of said enterprise with the knowledge and intent that other members of the conspiracy would engage in at least two incidents of racketeering activity as defined by Section 895.02(4), Florida Statute, which had similar intents, results, accomplices, victims or methods of commission or were otherwise related by distinguishing charactaristics and were not isolated incidents and

included crimes chargeable under Chapter 490.920-Medicaid Fraud, all in violation of 895.03(4), Florida Statutes, and said offenses occurred in two or more judicial circuits in the State of Florida as part of a related transaction, all in violation of 895.03(4), Florida Statutes, including, but not limited to the following:

PREDICATE A: MEDICAID PROVIDER FRAUD

On or about May 1, 1997, and continuing through and including May 31, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) in U.S. Currency for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE B: MEDICAID PROVIDER FRAUD

On or about May 1, 1997, and continuing through and including September 3, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1117, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE C: MEDICAID PROVIDER FRAUD

On or about June 3, 1997, and continuing through and including September 8, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal

conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1232, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE D: MEDICAID PROVIDER FRAUD

On or about August 25, 1997, and continuing through and including October 2, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the

furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of twenty five thousand dollars ($25,000.00) via check number 1334, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

PREDICATE E: MEDICAID PROVIDER FRAUD

On or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as a part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits, the defendant, **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to-wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc.,

did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of ten thousand dollars ($10,000.00) via check number 1440, Capital Bank account number 10501008421, for prescriptions he referred to IV Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

COUNT 3:

Medicaid Provider Fraud

MELANIE ANNE HINES, Statewide Prosecutor for the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, under oath, charges that on or about November 6, 1997, in the Second and Eleventh Judicial Circuits, to-wit: Leon and Miami-Dade Counties, Florida as part of a related transaction occurring in two or more Judicial Circuits, or in connection with an organized criminal conspiracy affecting two or more Judicial Circuits the defendant **MARK KENNETH SACHS**, and others, to wit: Elizabeth Pascual and Isabel Calderon, as a part of a related transaction occurring in two or more judicial circuits did knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing, or arranging for the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid Program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program, to wit: Elizabeth Pascual and Isabel Calderon, d/b/a IV Solutions, Inc., did pay Mark Kenneth Sachs, a medicaid provider physician, the amount of ten thousand dollars ($10,000.00) via check number 1440, Capital Bank account number 10501008421, for prescriptions he referred to IV

Solutions, Inc., which were ultimately paid for by the Medicaid program, in violation of Chapter 409.920(2)(e), Florida Statutes.

ALL OF SAID OFFENSES BEING AGAINST THE PEACE AND DIGNITY OF THE STATE OF FLORIDA.

Dated this 6th day of November, 2002.

MELANIE ANNE HINES
STATEWIDE PROSECUTOR
STATE OF FLORIDA

HUGO ACEBO
Assistant Statewide Prosecutor
Florida Bar NO. 999296
Office of Statewide Prosecution
110 SE 6th Street, Suite 1400
Fort Lauderdale, FL 33301
(954) 712-4950

***

APPENDIX E

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. F02-32726

MARK KENNETH SACHS,

Defendant.

DEFENDANT'S MOTION TO DISMISS

Defendant Mark Kenneth Sachs, by and through undersigned counsel, makes this, his Motion to Dismiss, and would show:

On February 6, 2003, The Hon. David Miller of this Circuit entered his Order in *State of Florida v. Gabriel Harden*, Case No. F00-38785, granting the defendant's motion and dismissing the case on grounds of the facial unconstitutionality of the statute under which Harden was, and Dr. Sachs is, charged. See Exhibit A attached hereto.

On January 28, 2004, the Third District Court of Appeal affirmed the lower court's ruling concluding that "the trial court properly found that there was implied conflict preemption and declared section 409.920, Florida Statutes (2000), unconstitutional". See Exhibit B attached hereto.

WHEREFORE Defendant Mark Kenneth Sachs respectfully requests this Honorable Court to enter its Order granting the relief sought herein and dismissing the within cause; and granting such other relief as to this Honorable Court shall seem just.

Respectfully submitted,

HIRSCH & MARKUS, LLP

Milton Hirsch

Fla. Bar No. 350850

Two Datran Center, Suite 1200

9130 South Dadeland Bouelvard

Miami, Florida 33156

Tel: 305-670-0077

Fax: 305-670-7003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by facsimile and/or U.S. mail this 3 day of February, 2004, to: Teresa Williams, Office of the Statewide Prosecutor, The 110 Tower, Suite 1400, 110 SE 6th Street, Ft. Lauderdale, FL 33301.

_____

MILTON HIRSCH

APPENDIX F

Article VI, clause 2 of the United States Constitution, provides the following:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

APPENDIX G

42 U.S.C. § 1320a-7b provides, in part, the following:

* * *

(b) Illegal remunerations

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in case or in kind–

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person–

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to –

* * *

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

* * *

APPENDIX H

§ 409.920, Fla. Stat. (2000), provided in pertinent part:

409.920 Medicaid provider fraud.–

(1) For purposes of this section the term:

* * *

(c) "Item or service" includes:

1. Any particular item, device, medical supply or service claimed to have been provided to a recipient and listed in an itemized claim for payment; or

2. In the case of a claim based on costs, any entry in the cost report, books of account, or other documents supporting such claim.

(d) "Knowingly" means done by a person who is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the intended result.

(2) It is unlawful to:

(e) Knowingly solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate indirectly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service for which payment may be made, in whole or in part, under the Medicaid program.

A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

APPENDIX I

42 C.F.R. § 1001.952 provides in pertinent part:

§ 1001.952 Exceptions

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

* * *

(i) Employees. As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. For purposes of paragraph (i) of this section, the term employee has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

APPENDIX J

STATE MEDICAID FRAUD STATUTES

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
AL	Code of Ala. § 22-1-11 (2006)	None	Yes
AK	No statute found	N/A	N/A
AZ	A.R.S. §13-3713 (2006)	Knowingly	No
AR	A.C.A. § 5-55-111 (2006) and A.C.A. § 20-77-902 (2006)	Purposely Knowingly	Yes Yes
CA	Cal Wel & Inst Code § 14107.2 (2006)	None	Yes

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STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
CO	C.R.S. 26-4-1103 (2006)	Intentionally or with Reckless Disregard	Yes
CT	Conn. Gen. Stat. § 53a-161c (2006)	Knowingly	Yes
DE	31 Del. C. § 1005 (2006)	None	Yes
DC	D.C. Code § 4-802 (2006)	None	No
FL	Fla. Stat. § 409.920 (2000)	Knowingly	No
GA	No statute found	N/A	N/A
HI	No statute found	N/A	N/A
ID	No statute found	N/A	N/A
IL	305 ILCS 5/8A-3 (2006)	None	Yes

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
IN	Burns Ind. Code Ann. § 12-17.6-6-12 (2006) Burns Ind. Code Ann. § 12-15-24-2 (2006)	Knowingly or Intentionally None	No No
IA	No statute found	N/A	N/A
KS	K.S.A. § 21-3847 (2006)	Knowingly and Intentionally	No
KY	KRS § 216.2950 (2006) KRS § 205.8461 (2006)	Knowingly Knowingly	Yes Yes
LA	La. R.S. 14:70.5 (2006)	Intentional	Yes

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ME	No statute found	N/A	N/A
MD	Md. Criminal Law Code Ann. § 8-511 (2006)	None	No
MA	ALM GL ch. 118E, § 41 (2006)	None	Yes
MI	MCLS § 400.604 (2006)	None	No
MN	Minn. Stat. § 62J.23 (2005) (authorizes adoption of administrative rules that may be more restrictive than federal requirements)	N/A	N/A
MS	Miss. Code Ann. § 43-13-207 (2006)	None	No

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
MO -	§ 191.905 R.S.Mo. (2006)	Knowingly	No
	§ 198.148 R.S.Mo. (2006)	Purposely	Yes in § 198.151 R.S.Mo.
	§ 198.145 R.S.Mo. (2006)	Purposely	Yes in § 198.151 R.S.Mo.
MT	Mont. Code Anno., § 45-6-313 (2005).	Purposely or Knowingly	Yes -
NE	No statute found	N/A	N/A
NV	Nev. Rev. Stat. Ann. § 422.560 (2006)	None	No
NH	12 RSA 167:61-a (2004)	Knowingly	No

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NJ	N.J. Stat. § 30:4D-17 (2006)	None	Yes
NM	N.M. Stat. Ann. § 30-41-2 (2006)	Knowingly	Yes in § 30-41-3
	N.M. Stat. Ann. § 30-41-1 (2006)	Knowingly	Yes in § 30-41-3
	N.M. Stat. Ann. § 30-44-7 (2006)	None	No
NY	NY CLS Soc Serv § 366-d (2006)	None	Yes
	NY CLS Soc Serv § 366-f (2006)	Intent to defraud–	Yes

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NC	No statute found	N/A	N/A
ND	No statute found	N/A	N/A
OH	ORC § 2913.40 (2006)	With purpose to commit fraud or Knowing that the person is facilitating a fraud	No
OK	56 Okl. St. § 1005 (2005)	Willfully and Knowingly	Yes in Okl. St. § 1-742
OR	No statute found	N/A	N/A
PA	62 P.S. § 1407 (2005)	None	No

STATE	KICKBACK STATUTE	MENS REA LANGUAGE	EMPLOYEE SAFE HARBOR
RI	R.I. Gen. Laws § 5-48.1-3 (2006) R.I. Gen. Laws § 40-8.2-3 (2006)	Knowingly and Willfully Intentionally	Yes Yes
SC	S.C. Code Ann. § 44-113-60 (2006)	None	No
SD	S.D. Codified Laws § 22-45-4 (2006)	None	No
TN	No statute found	N/A	N/A
TX	Tex. Hum. Res. Code § 32.039 (2006)	Knowingly See §32.0391	Yes in § 32.029(x)(3)
UT	Utah Code Ann. § 26-20-4 (2005)	None	No

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VT	No statute found	N/A	N/A
VA	Va. Code Ann. § 32.1-315 (2006)	Knowingly and Willfully	Yes
WA	Rev. Code Wash. (ARCW) § 74.09.240 (2006)	None	Yes
WV	W. Va. Code § 9-7-5 (2006)	None	No
WI	Wis. Stat. § 49.49 (2006)	None	Yes
WY	No statute found	N/A	N/A